Filed 2/27/19 P. v. Rosales CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JESUS ROSALES, Defendant and Appellant.	B286351 (Los Angeles County Super. Ct. No. BA193044)

APPEAL from an order of the Superior Court of Los Angeles County, Scott M. Gordon, Judge. Affirmed.

Law Offices of James Koester and James Koester for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In 2000, defendant and appellant Jesus Rosales pleaded no contest to two counts of committing a lewd or lascivious act upon a 14-year-old child. (Pen. Code, § 288, subd. (c)(1).)[1] While he was on probation for the offense in 2002, Rosales traveled to his native El Salvador. When he attempted to return to the United States, immigration authorities denied him admission and detained him. Federal immigration authorities subsequently revoked his status as a permanent resident and deported him.

In the years that followed, Rosales took several actions to attempt to reduce or expunge his conviction in the hope of regaining permanent resident status. Most recently, in 2017, Rosales filed a motion to vacate his conviction pursuant to sections 1016.5[2] and 1473.7[3] on the grounds that he was not adequately informed about and did not understand the immigration consequences of his plea. After a hearing, the trial court denied the motion. Rosales contends that the trial court erred in denying his motion. We affirm.

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[2] Section 1016.5 requires trial courts, in cases in which a defendant was not adequately advised of the immigration consequences of a plea of guilty or no contest, to "vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty." (§ 1016.5, subd. (b).)

[3] Section 1473.7 allows defendants who are no longer in criminal custody to file a motion to vacate a conviction or sentence if "[t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).)

FACTS AND PROCEEDINGS BELOW

Rosales and his family came to the United States from El Salvador in 1988, when Rosales was 16 years old. He obtained political asylum and permanent residency in the United States in the same year. He attended high school in the United States but dropped out to work as a construction worker. In 1995, he married a United States citizen, with whom he has four children.

In 1998, when Rosales was 26 years old, he had sexual intercourse with a 14-year-old girl. An information charged him with two counts of lewd and lascivious acts with a minor aged 14 or 15 years old, in violation of section 288, subdivision (c)(1). Rosales faced a maximum sentence of 3 years 8 months in prison. In 2000, Rosales pleaded no contest to both counts in an open plea, and the trial court sentenced him to 15 days in jail, plus community service and five years of formal felony probation.

The hearing in which Rosales pleaded no contest was conducted in English, and no translator was present. Rosales speaks Spanish as his native language, and he claims that at the time of the hearing, he spoke only rudimentary English. He also claims that his attorney at the time did not speak fluent Spanish, and that the two had trouble communicating. His attorney arranged for Rosales to be evaluated by a psychologist, and Rosales spoke with the psychologist in Spanish. During the hearing at which Rosales pleaded no contest, Rosales responded to the prosecutor's questions in English and did not request clarification or say that he did not understand. At the time of the hearing, he had been enrolled in courses teaching English as a second language for approximately one year.

During the hearing, the prosecutor warned Rosales as follows: "[A]ccording to the current law, I must inform you that if you are not a citizen of the United States, you will be deported, denied reentry or given complete denial of citizenship." Rosales claims that he does not remember receiving this advisement and

would not have understood enough English at the time to comprehend it.

In 2002, Rosales obtained the permission of the court and his probation officer to return to El Salvador to visit his father. When he arrived in Texas on his return flight, federal immigration authorities detained him. After three months in custody, Rosales's status as a permanent resident was revoked, and he was deported.

Between 2007 and 2014, Rosales attempted on at least four occasions to obtain relief from his conviction in the hope of restoring his immigration status. In 2007, he filed a petition for dismissal and to reduce his convictions to misdemeanors. The trial court granted the motion to reduce the convictions, but denied the petition for dismissal on the ground that Rosales was statutorily ineligible for this relief. In 2009, he filed another petition for dismissal, which was also denied. In 2011 and 2012, Rosales filed petitions for a writ of *coram nobis* in this court and in the California Supreme Court, but both petitions were denied. Finally, in 2013, Rosales filed a motion to withdraw his no contest plea under section 1016.5, contending that, because of his poor English, he did not understand the court's advisement of the immigration consequences of his plea. In 2014, the trial court denied the petition on the ground that Rosales had had enough prior experience with the judicial system that he would have known to request an interpreter if he needed one.

In 2017, Rosales filed the motion currently at issue. He sought to vacate his conviction under both sections 1016.5 and 1473.7. In his new petition under section 1016.5, Rosales argued for the first time that the advisement of the immigration consequences for his plea was defective because the prosecutor's language did not accurately reflect the language required by section 1016.5. Rosales also contended that he was entitled to relief under section 1473.7 because he did not meaningfully understand the potential adverse immigration consequences of his plea.

After a hearing, the trial court denied both motions. The court found that Rosales's claims that he did not understand the advisement regarding the immigration consequences of his plea were not credible. The court also found that Rosales could not justify the multi-year delay after his deportation before bringing a motion under section 1016.5. Finally, the court found that, in light of the relatively light sentence for a serious offense, Rosales had failed to show a reasonable probability that he would not have entered his no contest plea if he had been properly advised.

DISCUSSION

Rosales contends that he is entitled to relief under section 1016.5 because the wording of the prosecutor's advisement to him regarding the immigration consequences of his plea differed from the text of the statute. We hold that the advisement was sufficient because it substantially complied with the statutory requirements, and for that reason we need not decide whether the trial court erred in concluding that Rosales forfeited his right to relief under section 1016.5 by failing to bring his motion in a diligent and timely fashion. Similarly, we need not decide whether Rosales is barred from bringing a new motion under section 1016.5 because he already made a similar motion in 2013. Rosales also contends that the trial court erred in determining that he understood the prosecutor's advisement

regarding immigration consequences of his plea, and he was therefore not entitled to relief under section 1473.7. We reject this claim as well.

A. *The Wording of the Advisement Under Section 1016.5*

Prior to accepting a defendant's plea of guilty or no contest, section 1016.5, subdivision (a) requires the trial court to "administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, *exclusion from admission to the United States*, or denial of naturalization pursuant to the laws of the United States." (Italics added.) If the court does not issue this advisement, "the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty." (§ 1016.5, subd. (b).)

In this case, the prosecutor read the advisement to Rosales on behalf of the trial court, but the prosecutor's words deviated from the text required by the statute. The prosecutor read as follows: "[A]ccording to the current law, I must inform you that if you are not a citizen of the United States, you will be deported, *denied reentry* or given complete denial of citizenship." (Italics added.)

Rosales contends that because of this shift in language—from "exclusion from admission to the United States" to "denied reentry"—he was not properly advised and is entitled to withdraw his plea of no contest. We disagree.

Trial court decisions regarding relief from a plea under section 1016.5 are ordinarily reviewed for abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 (*Zamudio*).) Rosales contends, however, that in light of the United States Supreme Court's decisions in *Padilla v. Kentucky*

(2010) 559 U.S. 356 and *Chaidez v. United States* (2013) 568 U.S. 342, adverse immigration consequences must be considered direct, rather than collateral consequences of a guilty plea, and that we should therefore review the trial court's decision de novo. We need not decide this question because in this case, the analysis and result are the same regardless of the standard of review. There is no dispute about the text of the advisement that the prosecutor read to Rosales, and so the only question we must decide is purely a matter of law: whether the advisement was sufficient to comply with the requirements of section 1016.5.

We answer that question in the affirmative. As Rosales acknowledges, the court in *People v. Gutierrez* (2003) 106 Cal.App.4th 169 (*Gutierrez*) addressed a virtually identical situation and rejected the position Rosales advances. The court in *Gutierrez* held that "only substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea." (*Gutierrez*, *supra*, 106 Cal.App.4th at p. 174.) Those three consequences are "deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (b).) The court held further that " ' "[e]xclusion" ' " is equivalent to " ' "being barred from entry to the United States" ' " (*Gutierrez*, *supra*, 106 Cal.App.4th at p. 174, quoting *Zamudio*, *supra*, 23 Cal.4th at p. 207), and consequently, that the trial court substantially complied with the requirements of section 1016.5 when it warned the defendant that he could be " 'denied reentry' " as a result of his plea. (*Gutierrez*, *supra*, at p. 173.)

Rosales contends that the *Gutierrez* court erred in reaching this conclusion.[4] He notes that "reentry" is not a term of art in federal immigration law. But the federal Immigration and Nationalization Act (8 U.S.C. § 1101 et seq.) defines "admission" as "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." (8 U.S.C. § 1101(a)(13)(A).) Thus, by definition, "admission" and "entry" are virtually synonymous. Rosales contends that the terms are distinct because "admission" does not apply to all circumstances in which a permanent resident enters the United States. For example, a permanent resident who returns to the United States after less than 180 days away is ordinarily not regarded as seeking admission. (See 8 U.S.C. § 1101(a)(13)(C)(ii).) This exception does not apply, however, to those like Rosales who have been convicted of a crime of moral turpitude. (See 8 U.S.C. § 1101(a)(13)(C)(v).) For someone in Rosales's position, entering the United States is equivalent to admission. We can see no circumstance in which the advisement to Rosales would have been defective or failed to put him on notice of the immigration consequences of leaving and returning to the United States. We conclude that the *Gutierrez* court's analysis is correct, and Rosales was adequately advised of the immigration consequences of his plea.

---

[4] Rosales contends that the court's reasoning in *Gutierrez* is dicta because the court also reasoned that the trial court in that case cured any error in the text of the advisement by providing the defendant with a written waiver of rights form that included the correct language. (See *Gutierrez*, *supra*, 106 Cal.App.4th at pp. 174–175.) Whether dicta or not, we agree with it.

B. *The Section 1473.7 Claim*

Section 1473.7 provides that a court shall vacate the conviction of a person no longer in custody if "[t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) We review a trial court's denial of a motion to vacate a conviction under section 1473.7 de novo because it presents "a mixed question of fact and law that implicates a defendant's constitutional right." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)

In order to establish eligibility for relief under section 1473.7, a defendant must show that he did not meaningfully understand the immigration consequences of his plea. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 829-830.) This is a question of fact, and "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record." (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76.)

In this case, substantial evidence supported the trial court's finding that Rosales understood the immigration consequences of his plea. The record supports the conclusion that Rosales spoke English reasonably well at the time of his plea. He had been living in the United States for approximately 12 years and had attended school in the United States through at least part of high school. In addition, he had been taking classes in English as a second language for approximately one year. The transcript of the plea hearing also supports the trial court's conclusion. As the court noted, the attorney who represented Rosales at that hearing did not request that an interpreter be present. The transcript shows that Rosales was able to answer the prosecutor's questions regarding his rights accurately and

without any apparent confusion. The trial court was not unreasonable in crediting this evidence over Rosales's testimony that he did not speak English well enough at the time to understand the advisement.

Because the trial court's conclusion that Rosales understood the immigration advisement finds sufficient support in the record, we need not decide whether the trial court erred in concluding that any error would have been harmless because Rosales would have pleaded no contest regardless of the immigration consequences of doing so.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

WEINGART, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.